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In the
Supreme Court of the United States

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OCTOBER TERM, 1929.

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ABIE STATE BANK, ABIE, NEBRASKA,
Appellant,

vs.

ARTHUR J. WEAVER, as Governor of the State of Nebraska, and CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce,
Appellees.

WILLIS M. STEBBINS, as Treasurer of the State of Nebraska,
Appellee.

MARY E. GANDY, et al., FRANK PALMER, et al., EDWARD LINCOLN, et al.,
Appellees.

—o—

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA.

—o—

Statement of matters against jurisdiction in compliance with Rule Twelve of this court, by Arthur J. Weaver, as governor of the state of Nebraska, and Clarence G. Bliss, as secretary of the Department of Trade and Commerce.

—o—

C. A. SORENSEN, *Attorney-General of Nebraska,*

CHARLES E. ABBOTT, *Special Counsel,*
Attorneys for Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

Number 750.

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MAY IT PLEASE THE HONORABLE COURT:

Appellees appeal from a decision rendered by the Supreme Court of the State of Nebraska. In appellees' statement to sustain the jurisdiction of the Supreme Court

of the United States, they quote and refer freely to the opinion and decision rendered in their favor by the District Court of Lancaster County, Nebraska and which was reversed on appeal by the Supreme Court of Nebraska. On appeal of an equity suit to the State Supreme Court in Nebraska, the case is tried *de novo*.

Sec. 9150, Compiled Statutes of Nebraska, 1922, provides:

> "Sec. 9150. *Review On Appeal in Equity.*—In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

We shall therefore make no further reference to the opinion and decision of the District Court, as they could have no bearing in this Court. We shall confine ourselves to the record in the Nebraska Supreme Court where the case was tried de novo.

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THE ISSUES TRIED AND DETERMINED IN THE SUPREME COURT OF NEBRASKA.

The plaintiff's petition was substantially as stated by it: excepting that it specifically assailed a special as

sessment for the Depositors Guaranty Fund levied in December, 1928, to apply on previously adjudicated claims of depositors against that Fund. (R., Vol. 1, pp. 3-9).

The answers of defendants and intervening defendants are omitted from appellant's statement and are important in view of the decision of the Supreme Court of Nebraska, upholding their contentions, including the issue of estoppel.

The answer of Arthur J. Weaver, was made as Governor of the State of Nebraska, and also made and filed for and on behalf of the public officials of the State of Nebraska and municipal and other public corporations of the State, depositors in failed banks and with adjudicated claims against the Depositors Guaranty Fund. Clarence G. Bliss answered as Secretary of Department of Trade and Commerce.

The answers of defendants denied generally all the material facts alleged by plaintiff; plead the adjudication in 1909 by the Supreme Court of the United States of the validity of the Nebraska Guaranty Fund law, in *Shallenberger v. First State Bank of Holsten,* 219 U. S. 114, 31 Sup. Ct. Rep. 189, 55 L. Ed. 217, and the reliance on and acting on such adjudication by both banks and depositors for eighteen years and that the same was *res adjudicata;* and plead extensive acts and representations by all the Banks inducing the deposits resulting in the claims that the special assessments were being levied to pay and constituting estoppel (Answer, R. Vol. 1, P. 29).

Petitions in intervention (and cross-petitions), joining with defendants, were filed by Willis M. Stebbins as Treasurer of the State of Nebraska, and also by other depositors with adjudicated claims against the Depositors Guaranty Fund, on behalf of themselves and others similarly situated.

The Nebraska Supreme Court upon trial *de novo* found for defendants and interveners on the facts and on the authority of *Shallenberger v. Holsten*, held the law constitutional; and on the plea of estoppel and the facts in support thereof held the banks were estopped to assert the invalidity of the law. (Opinion and decision, R., Vol. 1, P. 77). Three large volumes of testimony support these holdings and disclose that the affirmative contentions of the banks were not supported. (Record of Evidence, Vols. 2, 3, and 4.)

The definite decision by the Nebraska Supreme Court of each proposition will be hereinafter quoted.

While the opinion and decision of the Supreme Court of Nebraska disclose that it was a joint judgment for defendants and interveners, the appellant has failed to perfect an appeal as to interveners, and appellant's transcript of the pleadings (R., V. 1) omits the pleadings of the interveners.

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GROUNDS AGAINST JURISDICTION.

We submit as grounds against the jurisdiction of the Supreme Court of the United States in this case:

First. That this court has heretofore conclusively adjudicated the validity of the Nebraska law against appellant in the suit brought on its behalf, and the entire question is res adjudicata.

> *Shallenberger vs. First State Bank of Holsten,* 219 U. S. 114, 31 Sup. Ct. Rep. 189, 55 L. Ed. 217.

The Holsten Bank brought its action in that case as a representative of and on behalf of all the other Nebraska State Banks.

A judgment on questions in which a governmental agency or district, or the officers representing it, are involved, is binding and conclusive on all citizens, residents or other parties affected thereby.

> *McIntosh vs. Pittsburg,* 112 Fed. 705.

Where one bank as a representative of and on behalf of a group of banks litigates a matter in which the banks all had an identity of interests, the judgment in such case is binding and conclusive upon each member of such group.

> *Hart Steel Co. vs. Railroad Supply Co.,* 244 U. S. 294, 37 Sup. Ct. 506.
>
> *Washington Steam Packet Co. vs. Sickles,* 24 How. 333, 16 L. ed. 650.

Second. That by the decisions of this Court (quoting)

> "It is axiomatic that, in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear

affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented."

Powder Works vs. Davis, 151 U. S. 389, 393, 14 Sup. Ct. 350.

Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. Rep. 389.

Eustis v. Bolles, 150 U. S. 361, 14 Sup. Ct. 131, and cases cited.

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THE PRIOR ADJUDICATION BY THIS COURT.

The Nebraska Bank Guaranty Fund Law was passed in 1909. It contained and has since contained the following provisions among others (Compiled Statutes of Nebraska, 1922):

Sec. 7983. The business of banking * * * is hereby declared to be a quasi-public business and subject to regulation and control by the State.

Sec. 8024. For the purpose of providing a Guaranty Fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this State, shall be subject to assessment to be levied, kept, collected and applied as hereinafter provided.

Sec. 8026. Provides for a regular assessment of one-twentieth of one per cent semi-annually on the average daily deposits; and Sec. 8028 provided for special assessments of one per cent on the average daily deposits; in 1923, long after the decisions to be quoted, this special assessment was reduced by the Legislature to one-half of one per cent, where it has since remained. (Laws Nebraska, 1923)

After the passage of the law an action was promptly brought by the First State Bank of Holsten and other Banks as plaintiffs, on their own behalf and on behalf of the other Nebraska State Banks, including Abie State Bank, against A. C. Shallenberger, as governor, to enjoin the enforcement of the law. The lower federal court on demurrer granted an injunction (172 Fed. 999). The case was then appealed to the United States Supreme Court and by this court reversed and the law sustained *Shallenberger v. First State Bank of Holsten,* 219 U. S. 114, 31 S. Ct. Rep. 189; 55 L. Ed. 217). The memorandum opinion of the United States Supreme Court stated that the case was governed by the decision in a similar case from Oklahoma entitled *Noble State Bank v. C. N. Haskel, as Governor, et al.,* 219 U. S. 104, 55 L. Ed. 112.

The petition filed in the Shallenberger v. Bank of Holsten case raised, directly or in principle, every material question that has been raised in this Abie State Bank case. Inasmuch as the State Bank of Holsten case was determined on demurrer all questions well-pleaded stood admitted and by the decision were determined against the banks. The petition therefore is important and a copy thereof is attached to the Record herein as Exhibit 49 at Page 724, V. 4. Some of the plaintiff banks in that

case were private banks. The banks pleaded vested property rights, that their charters were binding contracts and not subject to change, that under the new banking act it was made unlawful to be in the banking business after the effective date of said banking act except by compliance with its terms and receipt of a charter and certificate thereunder, involving the payment of Guaranty Fund assessments, regulation, etc.; they alleged that their property was taken without due process of law, because their banking buildings and fixtures acquired under the prior existing law would be rendered less valuable or confiscated; that by the terms of said act the Guaranty Fund assessed against the capital stock of each of said banks became a general fund appropriated for the payment of depositors in failed and insolvent banks, thereby making solvent banks contribute out of their assets sums of money to be used, not for the payment of their own liabilities but for the payment of the liabilities of other banks; that the total deposits in the state banks amounted to $76,644,015, and that the special assessment provided for would amount to the sum of $766,440.15 annually, and that the said special assessment was unreasonable and confiscatory; that the purpose and scope of the said act was to extend the credit of the state of Nebraska to individual banks; that to require private bankers to transfer their business to a corporation or in lieu thereof to discontinue their business or to have their affairs wound up by a receiver would result in loss and damage to each and singular of said banks and deprive them of their property, all in violation of state and federal constitutions.

The Abie State Bank was then doing a banking business (R., Vol. 2, p. 147), and the suit was on its behalf. A comparison of the assignments of errors and arguments now urged as to the invalidity of the law as a ground of jurisdiction indicates that they are exactly the same as were adjudicated in the Holsten Case.

The one exception now sought to be made is the statement that the unpaid claims against the Guaranty Fund now aggregate $15,000,000. This affects the claimants but not the banks. It merely postpones the time of payment of the claimant depositors. The amount of assessments to be paid annually by the banks is not increased or affected by it. The maximum liability of any bank is the payment of one-tenth of one per cent regular assessment and five-tenths of one per cent special assessment annually on its deposits; aggregating $600 per $100,000 of deposits. This amounts to about nine cents out of each dollar of gross income. Salaries and wages consume three times as much. (Rec. Vol. 4, p. 710, Ex. 39).

The comparison by appellant of the gross liabilities of the fund with capital of banks is misleading. One has no relation to the other. Nor do the banks pay eight per cent on their capital to the Guaranty Fund, as appellant states; nor any other per cent. Increased earnings by reason of the benefits of the Guaranty Fund furnish the income to pay its assessments. Exemption from giving bonds for public deposits is but one of these benefits; the average surety company rate on bonds is seven-tenths of one per cent (R., pp. 716-8, Vol. 4). Higher than the Guaranty Fund rate. The action of the Legislature of

1923 in cutting the assessments practically in two necessarily caused the accumulating of unpaid claims.

So in principle, the situation is as it was at the time the Court adjudicated the law as Constitutional.

A number of contentions of fact in appellant's statement of Grounds of Jurisdiction are entirely unfounded. For example, on page 7, it is stated that the Supreme Court of Nebraska in its opinion recognized the "confiscatory character of the tax." The decision of that court was exactly to the contrary as shown by an excerpt from the opinion on that precise point.

> "In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that "it is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." In his opinion, the conditions of the banks and their ability to pay the assessment is "incomparably better than in 1923."

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ESTOPPEL.

The answer pleaded in detail, numerous, extensive and continuous representations and acts by each and all of the banks constituting estoppel, waiver and laches; the latter two in a sense being embraced in the former term.

It was this question of estoppel, among others, that the Supreme Court of the State tried *de novo*. Approximately two-thirds of the opinion incorporating the decision is devoted to that question. The determination in the "third" paragraph of the syllabus on the issue of estoppel is for defendants and is general; the body of the opinion necessarily could not cover in detail all the acts constituting estoppel which were incorporated in the three volumes of testimony supporting the answer.

It was with reference to this defense made by the answer and this evidence that the Supreme Court made its general findings and decision and we shall necessarily briefly refer to the answer of the defendants and thereafter quote the opinion and decision of the Supreme Court on that issue.

Defendant answered (R., Vol. 1, P. 29):

That the plaintiff and other banks had each continuously advertised and used the Guaranty Fund Law, since its enactment, throughout the State of Nebraska and in their respective communities by newspaper advertisements, printed recitals on the stationery of the respective banks, personal solicitation and argument, circulation of the public, and signs on the interior and exterior of the banks generally, and had thereby and otherwise individually and collectively represented to the depositing public that all deposits in the state banks were protected by the Depositors Guaranty Fund; that its validity had been adjudicated by the Supreme Court of the United States in the case of *Shallenberger v. First State Bank of Holstein;* that each and all of said banks

were subject to assessment and would be assessed for any sum becoming due any depositor of any of said banks that might fail; and that each bank in the state system would pay any assessments necessary to pay depositors in failed banks; that the banks constituted in effect a mutual insurance association; that each state bank in Nebraska has demanded and received public funds for more than fifteen years without giving bonds under the provision of said Guaranty Fund Act that any bank which complied with its provisions should not be required to give further security or bond for the purpose of becoming a depository for public funds; that in 1923 the plaintiff and other banks acting in cooperation with plaintiff caused the legislature of Nebraska to reduce the maximum special assessment from one per cent to one-half of one per cent; that said representations were made in order to induce deposits in state banks and that depositors, relying on said representations and acts, deposited large sums of public funds and private money in state banks.

Averred that there now existed adjudicated claims against the Guaranty Fund in the sum of several millions of dollars which were based on public and private deposits made in banks by reason of such representations and acts.

Defendants averred the application for and the licensing of all state banks under said law and their operation thereunder for approximately twenty years and their invoking and exercising the benefits and privileges thereof, and that the obligation to pay the Guaranty Fund assess-

ments had become and was a part of their articles of incorporation and charter.

Averred that the banks had permitted and induced persons to deposit their moneys in reliance on the acts and representations of the Banks and to thereby become claimants against said Guaranty Fund—and without denial of liability for assessments or of the validity of said law. And averred further acts of representation and inducement which we will not burden this statement with.

Defendants averred that by reason of all of said facts, the plaintiff and other banks were estopped to question the validity or constitutionality of the law; to question or deny the reasonableness of any assessment levied thereunder; to question or deny liability to pay the assessments levied under the law.

These defenses were established beyond controversy by the evidence as shown in the record and the Nebraska Supreme Court specifically found in the syllabus and opinion for the defendants on these issues.

There were $2,000,000 of public funds in failed banks (Ex. 36, p. 590, Vol. 3, Record).

The Decision of the Nebraska Supreme Court on Estoppel.

The opinion containing the decision of the Nebraska Supreme Court is reported in 227 N. W. Rep. 922, and is a part of the record in this case brought to this court by appellants in perfecting their appeal (R., Vol. 1, p. 77). For the convenience of the court we will copy those parts pertaining to Estoppel.

The third paragraph of the syllabus (by the Court) is as follows:

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors guaranty fund."

We quote from the body of the opinion and decision on this issue:

> "It appears from the evidence of the president of one of the largest Nebraska state banks, that he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund. * * *
>
> "In 1926, during the months of June, July, August, and September, twenty-six, full page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter, appeared in one of Omaha's leading newspapers. These advertisements stressed the proposed protection that was shortly to be afforded the depositors of money in the state banks throughout Nebraska. And on one page of these advertisements, 336 banks are listed as having paid their pro rata share of the cost of the publication. The largest state bank, located in Omaha, paid between $500 and $600 as its share of the expense of this newspaper publicity. The enterprise was given wide circulation in practically every town and its suburbs where a state bank was located, by illustrated newspapers with reading matter that was calculated to attract favorable attention and the patronage as well, of those having money for bank deposit. Following are some of the headings of the illustrated pages:

"A Story no other State Can Tell"; "No Mattress Banks in Nebraska;" "Strong Banks make Strong States;" "In the Hands of Skilled Bankers;" "State Banks protect their deposits in Nebraska;" "Nebraska is a Remarkable State;" "Pushing your money Through the Window;" "In Nebraska the Guarantee Works both Ways;" "All Work together in Nebraska;" "Safe through the Slump of Deflation Days." "The Men Who told the Story that no other State Can Tell" concludes the series of illustrated pages, and is followed by an enumerated list of the 336 state banks that sponsored the depositors guaranty fund enterprise.

These twenty-six advertisements appear at Pages 240, et seq., V. 2, Record, and the fourth of the series (Page 243, V. 2) has on the upper half of the page, a picture of the United States Supreme Court in session, and below an advertisement as to the constitutional adjudication headed "The Opinion of the Highest Court."

We quote the Nebraska Supreme Court further:

"From the evidence it clearly appears that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks. To illustrate this feature of the guaranty fund law, a brief excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska papers having a large circulation may be noted:

"First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the Guarantee Fund. This is a natural feeling as they are in no way responsible for

the banks that fail. * * * The guarantee fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent a year. * * * Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state."

"In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that "it is no exaggeration to say that it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." In his opinion, the conditions of the banks and their ability to pay the assessment is "incomparably better than in 1923."

"First State Bank v. Smith, (S. Dak.), 207 N. W. 467, is cited by defendants and is in point. The court there observed that the banks had for many years accepted the benefits of the guaranty fund law and in consequence were not then in position to resist the just claims of depositors. The court also observed that the personal rights of the individual must always yield to the "rightful exercise of the police power."

It may here be noted that the maximum amount of the guaranty fund special assessment was reduced by the legislature in 1923 from one per cent, to one-half of one per cent, but subsequently the depart-

ment of trade and commerce, pursuant thereto, levied the special assessment of one-fourth of one per cent, within the maximum amount now fixed by the legislature, and of which complaint is now made by the plaintiff bank on its own behalf and in behalf of 556 other state banks, as above noted.

"The paramount object, and clearly the legislative intention in the creation of the depositors bank guaranty fund law was first for the protection of the depositors' money in the state banks. And from the fact that, under normal banking conditions, such act would likewise benefit the state banks such banks were, at least, not unfriendly to the enactment of the law in question. But it goes without saying that there never was, nor could be, any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks, pursuant to the terms of the depositors guaranty fund law, and by that law such banks are clearly bound.

"The demands on the guaranty fund are burdensome but the situation before us was created, or in any event was made possible, by the legislature in the enactment of the law. It is a basic principle that it is, ordinarily, not within the province of the courts to annul a legislative act except as a last resort and in a case where no other remedy is at hand. In view of the benefits arising from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits? Have the observations of Judge Holmes in the Noble State Bank case, above cited, ever been answered? If so, our attention has not been directed thereto.

The Nebraska Supreme Court in the above opinion and decision refers to *First State Bank v. Smith* (S. Dak.)

207 N. W. 467 as in point. In that case claims against the fund had accumulated in large amounts while the banks were enjoying the benefits of the law and they sought to escape assessments to pay the accrued claims and the Court said (syllabus):

> "Such banks for ten years, accepted the benefits of the depositors' guaranty fund, which gave to them the right to hold, on deposit, public moneys without additional bond or security, to enjoy the confidence of the public by reason of the existence of such guaranty fund and all other benefits, real or supposed, emanating therefrom, and they are not now in a position to claim they have not consented thereto."

Appellants copy into their statement (Page 6) the entry from the Journal of the Supreme Court of Nebraska and maintain that it constitutes the basis of the decision of that Court. This entry on the journal constitutes nothing more than a notation of the directions for the disposal of the case.

Under the statutes of Nebraska, quoted supra, an equity case comes on appeal to the Nebraska Supreme Court for trial de novo. And that Court by Sec. 9150 C. S. Neb. 1922 is required to "*reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence.*"

The Supreme Court of Nebraska did this and found against the banks on the grounds of estoppel. The syllabus and opinion of that court both contain this specific finding of fact, and a decision thereon, and that syllabus and opinion are a part of the record brought to the Supreme Court of the United States by appellants. More-

over appellants assign as error the holding of estoppel against them as contained therein. (Assignment No. 3).

The decision of the State Supreme Court with the grounds and reasons for the decision as given in the syllabus and opinion of the court are the basis upon which the Supreme Court of the United States has always decided the question of the grounds of jurisdiction.

> *Thompson vs. Maxwell Land Grant Railway Co.*, 168 U. S. 451, 42 L. Ed. 539.
>
> "Whenever a case comes from the highest court of a State for review, and by statute or settled practice in that State, the opinion of the court is a part of the record, we are authorized to examine the grounds of such opinion for the purpose of ascertaining the grounds of the judgment."
>
> *Burbank vs. Ernst*, 34 Sup. Ct. 299, 232 U. S. 162, 58 L. Ed. 551.
>
> *Cuyohoga River Power Co. vs. Northern Realty Co.*, 37 S. Ct. 643, 244 U. S. 300.
>
> *Gross vs. United States Mortgage Co.*, 108 U. S. 477, 27 L. Ed. 795.
>
> *Dibble vs. Billingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72.
>
> *Egan vs. Hart*, 165 U. S. 188, 41 L. Ed. 680.

The Supreme Court of Nebraska is required by Sections 1074 and 1075 C. S. Neb., 1922, to cause all of its opinions to be reported and published, and they are therein referred to as the decision. This has always been the practice in that court and in this case as in all others coming to this court on appeal, the opinion as incorporating the decision was included as a part of the record.

The case of *Enterprise Irrigation District, et al., vs. Farmers Mutual Canal Co.*, 243 U. S. 157, 37 Sup. Ct. Rep. 318, (an appeal from the Nebraska Supreme Court,) is squarely in point on this issue. In that case the Supreme Court of the United States held that it would not take jurisdiction where the decision of the State Court had been on the basis of estoppel in pais involving a non-federal question although an independent federal question was also involved. In that case the Supreme Court of the United States, in its opinion, discussed and considered the several separate grounds of the decision as set forth in the syllabus and opinion of the Nebraska Supreme Court. And in denying jurisdiction it was said:

> "A decision of the highest court of a state adverse to the contention that, consistently with the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., an adjudication of the state board of irrigation in favor of the asserted right of a canal company, under an alleged priority of appropriation, to divert through its canal a certain amount of water from a stream, could not be treated as binding upon those claiming under other appropriations, because it was made without lawful notice or opportunity to be heard, is not reviewable in the Federal Supreme Court on writ of error, where the state court also decided that the canal company was entitled to prevail for the reason that its adversaries were estopped by their own conduct to question the canal company's claims."

> "The contention that the highest court of a state, in disposing of some of the questions involved in a clause (case) including that of a defense of an estoppel in pais, misconceived or misapplied the statute and common law of the state, and thereby infringed the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend.,—presents

no Federal question which will sustain a writ of error from the Federal Supreme Court."

In *Arkansas, Southern R. Co. v. German National Bank*, 207 U. S. 270, 28 S. Ct. Rep. 78, 52 L. Ed. 201, the Court said:

"Ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

On page 3 of Appellants' Statement it refers to the proportion of banks that paid dividends during the two years preceding the commencement of this suit. This statement, apparently, is not pertinent to this jurisdictional question. Answering it, will say it was disclosed by an exhibit compiled from the records of the Banking Department that for the eighteen months period preceding the filing of this suit, those banks organized prior to 1909 had net earnings on their capital at the average rate for all of 15.66% per annum, and those organized after 1909 at the average rate of 14.29% per annum, after paying Guaranty Fund assessments, and before charging off bad debts sustained. These losses were largely on loans originating in the inflation period; they were very large with about one-fourth of the banks, and reduced the annual net average earnings of all the banks after charge-off of bad debts to 7.12% on their capital. More than three-fourths of the banks had net earnings available for dividends. The other one-fourth had the heavier losses. (Exhibit 38, Page 610, Vol. 3, Record.) It was bad debts, not Guaranty Fund assessments that reduced net earnings.

The present three million dollars of accrued assessments referred to by appellants is occasioned by the refusal of the banks to pay the several assessments levied since July, 1928.

In the case of *Shallenberger v. State Bank of Holstein*, the annual special assessment complained of was stated to be $766,644 on $76,644,015 of deposits, or 1% (see petition quoted herein); the law was held constitutional. The special rate of assessment has since been reduced one-half. At the time of the trial of this Abie Bank case the deposits of state banks was $252,000,000. (Ex. 38, p. 610, V. 3).

We respectfully submit that this court should not take jurisdiction of this cause on appeal.

Respectfully submitted,

ARTHUR J. WEAVER, as Governor of the State of Nebraska,

CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce,

Appellees.

C. A. SORENSEN,
Attorney-General of Nebraska.

CHARLES E. ABBOTT,
Special Counsel.